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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 850

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LaRUSSO and JOSEPH CHAGNON,

Petitioners,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX,

and

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, FRANKLYN TITUS AND THE BOARD OF EDUCATION OF NEWARK, IN OPPOSITION

Citations to Opinions Below

The opinion of the District Court is reported in 302 F. Supp. 726 (1969) and printed in Appendix C p. 10(a), petition for certiorari.

The opinion of the Court of Appeals, Third Circuit, is as yet unreported officially; it is printed in Appendix A p. 1(a), petition for certiorari.

Jurisdiction

As alleged in the petition for certiorari, the jurisdiction of this court is invoked under 28 U.S.C.A. Section 1254(1).

Questions Presented

The petition for certiorari states that the decision rendered below is in direct conflict with other Circuits, and to that end presented five questions for review. These questions are incorrectly and improperly presented, because the factual situation of the case at bar is clearly distinguishable from the cases decided in other Circuits, while the principle of law enunciated in other Circuits has been correctly applied in the instant matter.

The question as it should be stated is:

1. Can a Board of Education, in pursuance of a legitimate governmental objective, employ, assign and promote personnel on a color conscious basis in order to insure integration and equal educational opportunities, in compliance with the equal protection clause of the Fourteenth Amendment?

The Constitutional Provision Involved

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment, section 1, which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

The statement of statutes involved, contained in the petition for certiorari, is complete.

Statement of the Case

This matter was commenced under the Civil Rights Act 42 U.S.C.A., Section 1983, by ten white teachers in the employ of the Newark Board of Education, alleging deprivation of their right of promotion by reason of the fact that they were white.

The matter was heard before Judge Anthony T. Augelli in the United States District Court, for the District of New Jersey, without a jury. The only issue considered at the time was whether the Newark Board of Education did discriminate against petitioners because they were white.

Upon completion of the plenary hearing, the lower court dismissed the complaint, with prejudice, in an opin-

ion setting forth the findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure.

The factual allegations of the parties are not in dispute and to that end were consented to and filed with the trial court as a complete and comprehensive statement of the facts, as follows:

1. On February 1, 1967 the Newark Board of Education entered into an agreement with the Newark Teachers Association running until February 1, 1970.

2. The Newark Board amended its rules and regulations to conform with the agreement dated February 1, 1967, by its amendment of June 30, 1967, subject to law.

3. Both the rules and regulations and the agreement provided for written and oral examinations for promotion positions of principal and vice-principal. The rules and regulations provided for the continued maintenance of a list in numerical order of persons to fill vacancies in the positions existing for principal, vice-principal and teacher to assist the principal.

4. The school population in the City of Newark in October 1961 was 67,134, and had a Negro population of 55.1%. In September 1968 the total school population was 75,876, with a Negro student population of 72.5%, reflecting an increase in seven years of 8,742 students and a percentage increase of Negro students of 17.4%.

5. For the school year 1967-1968 there were 249 administrative and supervisory positions (Superintendents and Assistants, directors of departments, Supervisors; Senior High, Junior High, Elementary, Special Schools; principals and vice-principals, department chairmen; supervisory assistants and teachers to assist principals) of which 27, or 10% were held by Negroes.

6. Under date of May 28, 1968 there was in existence a list in accordance with the contract and Board rules and regulations, from which persons were to be appointed to the positions of principal, vice-principal and teacher to assist the principal.

7. Under date of May 28, 1968 the defendant, the Newark Board of Education, passed a resolution suspending any appointments from said list, which list was due to expire on Oct. 1, 1968.

8. On August 22, 1968 the defendant, Franklyn Titus, presented a recommendation to the defendant, The Newark Board of Education. The Board, pursuant to its then existing rules, suspended the operation of its rules and adopted the recommendation of the Superintendent and abolished the numerical promotion list and the examination procedure then in existence. This was an entirely new promotional procedure, contrary to the prior Board rules and the agreement dated February 1, 1967.

9. On August 22, 1968 the defendants made temporary appointments to the positions of principal, vice-principal and teacher to assist the principals without following the numerical promotional list.

10. The defendants admit that one of the criteria utilized in making the appointments complained of was the color of the applicant's skin, and Assistant Superintendent Moss, who made the initial recommendation of names, admitted that it was one of his prime considerations.

11. The defendants admit, as a matter of fact, that the bases for their action were as follows (as contained in the testimony of the defendant Titus, given in depositions on September 9, 1968, more particularly at pages 8, 9 and 13):

"Q. You wanted black personnel and/or Puerto Rican personnel, if qualified, in some of the principalships in the school system of Newark; is that not correct? A. I felt that the examination procedure as it has existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership.

Q. Well, now, in your— A. I—

Q. Pardon me, sir. A. I felt that in 20 years, 25 that had elapsed since the procedure was first or originally modified or developed, the conditions in the City had changed, educational philosophy had changed. There was a high premium on sensitivity than had existed hitherto. And for that reason I welcome the opportunity of reviewing the whole procedure.

Q. What is this sensitivity to which you refer, Mr. Titus? A. Sensitivity, as I see it, is that element of person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to educational needs that go out of the deprived conditions in many of our—most of our school neighborhoods.

Q. Well, now, how would that have bearing in relation to a school promotional examination list? A. As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.

Q. Well, now, when you say 'has to be able to identify,' do you mean has to be able to identify with this 77 per cent about which you have spoken? A. Their needs, the minority group needs, the

minority group personality, the minority group reaction the whole question of attitude in all aspects of the kid's personality as relative to the white power structure.

* * *

Q. Well, where didn't it? A. Because it didn't represent the kinds of racial mix that I feel is most important in accomplishing an educational program in the City of Newark, that's all.

Q. Now, you said 'racial mix'. So that what you were looking for were black principals; isn't that correct? A. I certainly wanted black representation.

Q. And you couldn't put black principals in at the present time while this list was in existence, could you? A. Not until the Board suspended the list."

12. Defendants and plaintiffs agree that of the eleven acting appointments made to the elementary school positions on August 22, 1968, which are involved in this case, seven persons were black and four persons were white. Four Negroes were named as acting principals and one white person was so appointed; two Negroes were named as acting vice-principals and no white person was so appointed; one Negro was appointed as acting assistant teacher to the principal and three white persons were so appointed.

Also on August 22, 1968 at the same meeting referred to above the following acting appointments were made on the secondary level:

Senior High School Principals: Two white persons and no black persons.

Junior High School Principal: One white person and no black person.

Senior High School Vice Principals: Eight white persons and four Negroes.

Teachers to assist the Principals: Three white persons and eight Negroes.

Departmental Chairman: Eleven white persons and no Negroes.

Junior High School Supervisory Assistants: Three white persons and one Negro.

13. The plaintiffs and defendants agree that as part of the Agreed Statement of Facts, there is attached hereto and made a part hereof, two statistical documents, one entitled,* "Table I. Total Pupil Population of Newark Day Schools, September 1968 and October 1961, and Percent of Negroes on Roll", and: "Table II. Administrative and Supervisory Positions in Newark Day Schools and Per Cent Held by Negroes 1967-68 and October 1968."

The foregoing Statement of Facts clearly demonstrates the candor and forthrightness of the Newark Board of Education. It also illuminates today's problems of maintaining and operating a large urban school district and the educational considerations necessary to furnish an equal public education for all pupils in the school district.

Reasons for Not Granting the Writ

(a) The opinion of the Court of Appeals for the Third Circuit is not in conflict with other circuits, nor is it in

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* The two statistical documents referred to are attached to the Agreed Statement of Facts filed with the court.

conflict with the decisions of this court. The lower court correctly applied the decision of the United States Supreme Court in *Brown* v. *Board of Education,* 349 U. S. 294, 75 S. Ct. 753 (1958), which held in effect that integration of faculties and integration of schools are of equal importance. In order to accomplish the integration of faculties in conformity with the decision, it of necessity required that the respondent, Newark Board of Education, institute a method of faculty selection.

(b) The petitioners have cited cases in other circuits as being in conflict with the opinion of the Third Circuit, and also for the purpose of indicating that the respondents violated the equal protection clause of the Fourteenth Amendment. The cases of *Rolfe* v. *County Board of Education,* 391 F. 2d 77 (6 Cir. 1969), *Kemp* v. *Beasley,* 389 F. 2d 178 (8 Cir. 1968); *Kelly* v. *Altheimer,* 378 F. 2d 483 (8 Cir. 1967), *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275 (4 Cir. 1967), and *Smith* v. *Board of Education of Morrilton School District,* 365 F. 2d 770 (8 Cir. 1966), while clearly enunciating the principle of equal protection under the Fourteenth Amendment, are inapplicable, since they involve factual situations which are distinguishable from the facts surrounding the action taken by the respondents. In those cases governmental authorities attempted to desegregate schools, and by so doing eliminated the need for black teachers in previously all Negro schools. The dismissal of the black teachers in those instances made it patently obvious that the black teachers were not hired as teachers in the various school districts, but rather as black teachers in an all black system. In the instant case the facts clearly indicate that in a predominantly populated non-white school system a sincere effort to produce meaningful representation on the administrative level was being achieved without excluding

white applicants from consideration for administrative posts.

(c) Not only is the opinion and ruling of the Court of Appeals of the Third Circuit in complete conformity with the rulings of the United States Supreme Court (*Brown* v. *Board of Education, supra*), but also with the rulings of other circuit courts. In *U. S.* v. *Jefferson County Board of Education,* 372 F. 2d 836 (1966), the court reviewed school desegregation plans to determine whether the plans meet constitutional standards; also to re-examine school desegregation standards in the light of the Civil Rights Act of 1964, and the guidelines of the U. S. Office of Education. The litigants contended that HEW and the courts cannot take race into consideration in establishing standards and guidelines. The court at p. 876 reacted as follows:

> "The constitution is both color blind and color conscious. * * * The criterion is the relevancy of the color to a legitimate governmental purpose."

And at p. 892 the court continued:

> "To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities even in the administration of an otherwise rational nondiscriminatory policy, should take corrective action involving criteria."

However, petitioners allege that the action of the respondents in penalizing them because they are white citizens constitutes a violation of their rights. This admission appears to give rise to a contradiction in petitioners' position since they admit imbalance in their original complaint and any correction of imbalance would of necessity

mandate taking into account or to set up a classification by race, which in this case would constitute color. In effect the petitioners are holding that the worthiness of the objective even when admitted, may not be corrected where a classification by race is utilized by a governmental authority. This position was advanced in the matter of *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1965). There the school authorities of Springfield, Massachusetts had passed a resolution to take appropriate action to eliminate racial concentration in schools within the framework of effective educational procedures. In meeting this challenge the Court of Appeals of the First Circuit stated:

> "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlated with proven deprivation of educational opportunity. This evil satisfies whatever 'heavier burden of justification' there may be. Cf. *McLaughlin* v. *State of Florida,* (1964) 379 U. S. 184, 194, 85 S. Ct. 283, 13 L. Ed. 2d 222. It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them. (*Booker* v. *Board of Education* (1965), 45 N. J. 161, 212 A. 2d 1)."

To the same effect attention should be focused on the matter of *Offerman* v. *Nitkowski,* 378 F. 2d 22 (1967)

where the court considered not only the issue of classification by race as being *per se* unconstitutional, but relied upon *Brown* v. *Board of Education, supra.* The court, at p. 24 stated:

> "Consideration of race is necessary to carry out the mandate in *Brown,* and has been used as noted in cases following *Brown.* Where it is used to insure against rather than to promote deprivation of equal educational opportunities. We cannot conceive that our courts would find that the state denies equal protection to either race by requiring its school boards to act with awareness of the problem."

To further highlight the issue here presented, it is interesting to note that classification by race has been considered in areas other than education. In *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (1968) the court was confronted with classification by race in order to implement and insure proper relocation for Negroes displaced to the same extent as white people. The argument presented was that setting standards to assure proper relocation is unconstitutional. In referring to the standards set for relocation the Court asserted as follows:

> "What we have said may require classification by race. That is something which the constitution usually forbids not because it is inevitably an impermissible classification but because it is one which usually to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed and to the extent it is necessary to avoid unequal treatment by race it will be required."

The court cites with approval *Hobson* v. *Hansen,* 269 Fed. Supp. 401 (1967), *Springfield School Committee* v. *Barksdale* (*supra*), and *Offerman* v. *Nitkowski, supra.*

In the above cited cases, while they do not deal with teacher assignments, the principles enunciated are clearly applicable in this matter. Not only is it important for teacher integration at all levels (27 administrative posts out of 259 held by Negroes in the Newark school system), but lack of such integration violates the equal protection doctrine, since it imposes unequal burdens or awards unequal benefits. See *Rogers* v. *Paul,* 382 U. S. 198 (1965), where the court recognized that improper racial faculty allocation does in effect deny students equality of educational opportunities. To the same effect we must direct our attention to *Hobson* v. *Hansen,* 269 Fed. Supp. 401 (1967), in which case the court examined a situation with respect to public education where the student population was 90% Negro. Judge Skelly Wright wrote a lengthy opinion on the effects of decisions made by school boards, although not deliberate but having a direct effect upon the Negro community, in violation of the equal protection doctrine. Judge Wright also examined the question of the assignment of teachers, and at p. 516 stated:

> "Next, assignment of incoming teachers must proceed on a *color conscious basis* to insure substantial and rapid teacher integration in every school." (Emphasis supplied)

Nowhere does the petition for review present a federal question of substance not heretofore determined by this court. Nowhere does the petition present a question wherein the Court of Appeals of the Third Circuit has rendered a decision in conflict with the decision of any other court of appeals. In fact, all the courts of appeal

are in complete agreement that color consciousness, used as a basis to insure integration and equal opportunities in compliance with the equal protection clause of the Fourteenth Amendment, is both permissible and mandated.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR A. DEFILIPPO,
Attorney for Respondents, Franklyn Titus and the Newark Board of Education.